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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: NOV 16 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is multi-media international financial information services company. It seeks to employ the beneficiary permanently in the United States as a project leader pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. *See* 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree...." *Id.*

After reviewing the petition, the Director determined that the beneficiary was ineligible for classification as an advanced degree professional because he did not possess either a master's degree in the requisite specialty or a baccalaureate degree plus five years of progressive experience in the specialty.

On appeal, counsel asserts that the beneficiary has the foreign equivalent of a U.S. baccalaureate degree plus five years of progressively responsible experience, which is equivalent to a U.S. master's degree and qualifies him for classification as an advanced degree professional.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The first issue on appeal is whether the beneficiary's educational credential – an 'A' Level Advanced Diploma from the Department of Electronics Accreditation of Computer Courses (DOEACC) Society in India – is a foreign degree equivalent to a U.S. baccalaureate degree, which, in conjunction with five years of progressively responsible experience, would qualify him for

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

classification as an advanced degree professional. The second issue is whether the beneficiary meets the job requirements of the proffered position as set forth on the ETA Form 9089 (labor certification).

Eligibility for the Classification Sought

The ETA Form 9089 in this case was accepted for processing by the DOL on October 27, 2008, and certified by the DOL on June 2, 2009. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) of the Act, as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Immigration Act of 1990 Act added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference (advanced degree professional) immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new

classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (INS, or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[2] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus five years of progressive experience in the specialty). *See* 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States

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[2] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).[3]

The documentation of record shows that the beneficiary was awarded an 'A' Level Advanced Diploma by the DOEACC Society in New Delhi, India, on April 8, 2003. The beneficiary's academic record indicates that his program included ten courses – with examinations taken in January 1999 (four courses), July 1999 (four courses), and January 2000 (two courses) – and a project entitled "Online Book Shopping." The DOEACC Society describes itself on its letterhead as "An Autonomous Scientific Society of Department of Information Technology, Ministry of Communications and Information Technology, Government of India." As stated in official notifications dated March 1, 1995 and April 10, 1996, the Government of India recognizes 'A' level examinations under the auspices of the DOEACC Society "as equivalent to [an] Advanced Diploma level course ... for the purpose of employment ... under the Central Government."

Thus, the DOEACC Society is an arm of the Indian government, not a college or university, and its Advanced Diploma is not a college or university degree as required under section 203(b)(2)(A) of the Act and the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) for classification of the beneficiary as an advanced degree professional.

Counsel claims that the beneficiary's diploma is equivalent to a bachelor's degree in computer science from a college or university in the United States. As evidence thereof counsel has submitted three evaluations of the beneficiary's educational credentials in India. They are from (1) [redacted] (Baruch), and (3) [redacted], all located in New York City.

[3] *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

According to the Trustforte evaluation, the DOEACC Society's educational programs are viewed as analogous to university studies in India. [redacted] asserts that each of the beneficiary's ten courses comprised around 60 hours of lecture and 60 hours of practical study, but provides no evidence in support of this assertion. [redacted] cites "the number of years of coursework" in the diploma program as one of the factors leading to his conclusion that it is equivalent to a U.S. bachelor's degree, but does not explain how he reaches this conclusion. The academic record shows that the beneficiary completed three series of courses culminating in exams at six-month intervals, as well as a project of indeterminate length. Thus, the DOEACC Society's academic program appears to have been considerably less than a four-year course of study in a standard U.S. baccalaureate degree. *See Matter of Shah, supra.*

In the Baruch evaluation, [redacted] asserts that each of the ten subjects on the beneficiary's academic record is equivalent to four courses in a traditional Indian or U.S. university. No documentary evidence has been submitted in support of this claim. [redacted] asserts that the 'A' Level Advanced Diploma is viewed in the international educational community as equivalent to a four-year bachelor's degree in computer science, and implies that U.S. universities would accept applicants with this credential to master's degree programs. Once again, however, no supporting evidence has been submitted – such as a letter from a U.S. university specifically confirming this claim. Like [redacted] cites the number of hours of the beneficiary's coursework and the number of years of the diploma program as grounds for finding it equivalent to a U.S. bachelor's degree. But he does not even state how many hours he thinks the courses comprised, and does not explain how approximately three semesters of coursework and an academic project equate to a four-year degree.

As for the Pace evaluation, [redacted] refers to the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) as authority for his claim that an 'A' Level Advance Diploma from the DOEACC Society is equivalent to a U.S. baccalaureate degree.[4] While acknowledging that EDGE has not

[4] According to its website, www.accrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions in over 40 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.*

According to its registration page, EDGE is a "web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_international_publications.pdf. If

published any entries pertaining to credentials awarded by the DOEACC Society, [redacted] cites the EDGE entries for professional accountants and engineers in India – which rate association membership in the Institute of Chartered Accountants of India (ICAI), the Institution of Engineers, India (IEI), the Institution of Electronics and Telecommunications Engineers (IETE), and the Institution of Mechanical Engineers, India (IMEI) as comparable to a bachelor's degree in the United States – as instructive guidelines for the advanced diplomas issued by the DOEACC Society to information technology professionals. The AAO does not agree.

Association membership in the ICAI, as EDGE clearly indicates, is achieved after four years of study beyond the higher secondary certificate (comparable to a high school diploma in the United States) and the passage of three examinations (including the foundation exam taken after one year of study, the intermediate exam taken after two years of study, and the final exam taken after four years of study). The four years of study required for ICAI association membership are well beyond the roughly three semesters of coursework completed by the beneficiary for his diploma from the DOEACC Society. As for association membership in the three engineering societies, EDGE indicates that it requires not only the passage of two examinations but also at least five years of work experience in one of the specialty fields. As far as the record shows, there is no similar work experience requirement in the information technology field for the DOEACC Society's 'A' Level Advanced Diploma.

After noting that the course list completed by the beneficiary in his diploma program was shorter than that of a baccalaureate program in computer science, [redacted] stated that classes in some foreign countries are one year long, and that individual classes in foreign countries sometimes encompass the contents of several classes in the United States. However, he submitted no detailed

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placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* At 11-12. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

information, much less documentary evidence, as to how these scenarios apply to any of the beneficiary's coursework. In fact, the academic record appears to refute the contention that any of the beneficiary's classes were a year long, since his courses were completed in a series of examinations that were six months apart. Prof. Nemes asserts that holders of an 'A' Level Advanced Diploma from the DOEACC Society are eligible for admission to a master's degree program in computer science or a related field at Pace University, but has not submitted an official letter from the university confirming this claim.

Regardless, even if the beneficiary's diploma from the DOEACC Society were comparable to a U.S. baccalaureate degree, similar to ICAI membership, this would not qualify him for the benefit sought. As noted by the federal district court in *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 (D.Or. Nov. 30, 2006), in professional and advanced degree professional cases, when the beneficiary is statutorily required to hold a baccalaureate degree, U.S. Citizenship and Immigration Services (USCIS) properly concludes that a single foreign degree or its equivalent is required. *Id.* at 17, 19.

Evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *see also Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For all of the reasons discussed above, the AAO determines that the Trustforte, Baruch, and Pace evaluations have little probative value as evidence that an 'A' Level Advanced Diploma from the DOEACC Society in India is equivalent to a baccalaureate degree in computer science from a college or university in the United States. Moreover, none of the evaluations can overcome the crucial stumbling block that the beneficiary's Indian diploma was not awarded by a college or university, as required under section 203(b)(2)(A) of the Act and the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) for visa classification as an advanced degree professional.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish that the diploma awarded to the beneficiary by the DOEACC Society in India is equivalent to a baccalaureate degree from a U.S. college or university. The record shows that the DOEACC Society is not a degree-granting college or university. Since the beneficiary does not have a foreign equivalent degree to a baccalaureate degree from a U.S. college university, he is not eligible for preference visa classification under section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(2).

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS under

> section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this case, Part H, line 4 of the labor certification states that a master's degree is the minimum level of education required for the job. Line 4-B states that the major field of study must be computer science, engineering, information systems, information networks, physics, finance, economics, mathematics, or a related field. Line 6 states that "experience in the job offered" is not required. Line 7 states that an alternative field of study is not acceptable. Lines 8, 8-A, and 8-C state that an alternate combination of education or experience is acceptable – specifically, a bachelor's degree and five years of experience. Line 9 states that a foreign educational equivalent is acceptable. Lines

10 and 10-B state that 12 months (one year) of experience in an alternate occupation is acceptable, with a job title of software developer or senior software developer. Line 14 – Specific skills or other requirements – states that progressively responsible experience must include experience with UNIX and Windows platforms.

The beneficiary does not meet all of the above requirements. In particular, he does not have a U.S. master's degree, or a U.S. bachelor's degree, or a foreign equivalent degree to a U.S. master's or bachelor's degree. Since he does not fulfill the requirements in Part H, lines 4, 4-B, 8, and 9 of the labor certification, the beneficiary does not qualify for the job.

Conclusion

The beneficiary does not have a United States master's degree or a U.S. baccalaureate degree, or a foreign equivalent degree of either, and thus does not qualify for preference visa classification under section 203(b)(2) of the Act. Nor does the beneficiary meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.